

1 THE HONORABLE JOHN C. COUGHENOUR  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 KURT SKAU, *et al.*,

11 CASE NO. C17-1499-JCC

12 Plaintiffs,

13 ORDER

14 v.

15 JBS CARRIERS, INC.,

16 Defendant.

17 This matter comes before the Court on Plaintiffs' motion for remand (Dkt. No. 13).

18 Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral  
19 argument unnecessary and hereby GRANTS the motion as it relates to remand and DENIES the  
20 motion as it relates to the award of attorney fees and costs.

21 **I. BACKGROUND**

22 Plaintiff Kurt Skau ("Skau") worked as a truck driver for Defendant JBS Carriers, Inc.  
23 ("JBS"). (Dkt. No. 1-1 at 3.) Skau filed a class action lawsuit against JBS in King County  
24 Superior Court alleging that JBS violated several Washington State pay and hour regulations.  
25 (*Id.* at 4–5.) JBS removed the lawsuit to this Court asserting diversity jurisdiction under 28  
U.S.C. § 1332. (Dkt. No. 1.) Skau asks the Court to remand the case to state court because JBS  
has not proved that the amount in controversy is greater than \$75,000. (Dkt. No. 13 at 6.)

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1       **II.    DISCUSSION**

2           A party to a civil action brought in state court may remove that action to federal court if  
3       the district court would have had original jurisdiction at the time of both commencement of the  
4       action and removal. *See* 28 U.S.C. § 1441(a); 14B Charles Alan Wright & Arthur R. Miller,  
5       Federal Practice and Procedure § 3723 (4th ed. 2013). Where federal jurisdiction is conferred by  
6       diversity, the removing party bears the burden of proving complete diversity of citizenship and  
7       an amount in controversy greater than \$75,000. *See Abrego Abrego v. The Dow Chem. Co.*, 443  
8       F.3d 676, 683 (9th Cir. 2006) (citation omitted). There is a strong presumption against removal  
9       jurisdiction, and federal jurisdiction “must be rejected if there is any doubt as to the right of  
10      removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). If the  
11      complaint does not specify the amount of damages claimed, a removing defendant must establish  
12      the amount in controversy requirement by a preponderance of the evidence. *Id.* at 566-67.

13           Skau’s motion turns on a single issue: should the Court factor prospective attorney fees  
14      into the \$75,000 amount in controversy requirement when it determines whether removal is  
15      proper under 28 U.S.C. § 1441. Skau asserts that the Court should only consider attorney fees  
16      that have been incurred at the time of removal. (Dkt. No. 13 at 9.) JBS argues that the Court may  
17      add to the amount in controversy a reasonable estimate of Plaintiff’s attorney fees likely to be  
18      incurred during litigation. (Dkt. No. 1 at 8.)

19           It is undisputed that where an underlying statute authorizes an award of attorney fees to a  
20      prevailing party, a claim for such fees can be included in the amount in controversy. *Galt G/S v.*  
21      *JSS Scandinavia*, 142 F.3d 1150, 1155 (9th Cir. 1998). There is Circuit split, however, as to  
22      whether attorney fees incurred after removal should be included in the amount in controversy.  
23      *Compare Hart v. Schering-Plough Corp.*, 253 F.3d 272, 273-74 (7th Cir. 2001) (holding  
24      prospective attorney fees are not included as part of amount in controversy), *with Suber v.*  
25      *Chrysler Corp.*, 104 F.3d 578, 585 (3d Cir. 1997), (“in calculating the amount in controversy, we  
26      must consider potential attorney’s fees.”) The Ninth Circuit has not resolved this issue. *See*

1 *Gonzales v. CarMax Auto Superstores, LLC*, 840 F.3d 644, 649 n. 2 (9th Cir. 2016). As the  
2 parties point out, courts across the Circuit—and within the District—have reached differing  
3 conclusions. (Dkt. Nos. 13 at 9); *compare Keodalah v. Allstate Ins. Co.*, No. C15-01412-RAJ,  
4 slip op. at 4 (W.D. Wash. Mar. 25, 2016) (holding that future attorney fees should not be  
5 included in amount in controversy), *with Roe v. Teletech Customer Care Mgmt. (CO), LLC*, No.  
6 C07-5149-RBL, slip op. at 4 (W.D. Wash. June 6, 2007) (holding that estimates of future  
7 attorney fees can be included in the amount in controversy).

8 The Court has addressed this issue in a prior case. *See Holstrom v. Safeco Insurance*  
9 *Company*, Case No. C12-0506-JCC, Dkt. No. 28 at 4 (W.D. Wash. 2012). Similar to this case,  
10 *Holstrom* involved a class action lawsuit that the Defendant removed to this Court based on  
11 diversity jurisdiction. *Id.* at 2. The Defendant argued that the amount in controversy requirement  
12 was met because the Plaintiff’s attorney would ultimately expend more than \$75,000 litigating  
13 the case. *Id.* The Court reasoned that because diversity jurisdiction must be determined at the  
14 time an action commences, it is too speculative and impractical to estimate prospective attorney  
15 fees as part of the amount in controversy. *Id.* The Court held that its position was “consonant  
16 with the policy of strict construction of federal jurisdiction and the goals underlying the amount-  
17 in-controversy requirement, which preserves the jurisdiction of the state courts and limits the  
18 diversity caseload of the federal courts.” *Id.* (citing *Snyder v. Harris*, 394 U.S. 332, 340 (1969)).  
19 In doing so, the Court joined others that have held that only attorney fees incurred at the time of  
20 removal should be included in the amount in controversy determination. *See, e.g., Gardynski-*  
21 *Leschuck v. Ford Motor Co.*, 142 F.3d 955, 959 (7th Cir. 1998); *Kahlo v. Bank of Am., N.A.*, No.  
22 C12-0083-RSM, slip op. at 3 (W.D. Wash. Mar. 28, 2012).

23 In this case, the parties dispute whether the amount in controversy is greater than  
24 \$75,000. Skau’s complaint seeks compensatory and exemplary damages, as well as attorney fees  
25 and costs under applicable state law. (Dkt. No. 1-1 at 12.) Because the complaint does not  
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1 specify the amount of damages sought, JBS has the burden of proving that the amount in  
2 controversy is greater than \$75,000.

3 In its notice of removal, JBS calculates Skau's prospective damages as \$53,648.66. (Dkt.  
4 No. 1 at 7.) Skau does not dispute this calculation. By declaration, Skau's attorneys assert that  
5 they had incurred \$14,085 in fees at the time JBS removed the case from state court. (See Dkt.  
6 Nos. 14, 15.) While the total of these figures falls \$7,266.34 short of the \$75,000 amount in  
7 controversy threshold, JBS argues that Skau will incur litigation costs far in excess of that  
8 shortfall over the life of the lawsuit. (Dkt. No. 1 at 8.) In addition, JBS cites to past class action  
9 cases in which Skau's attorneys have been awarded attorney fees that alone eclipsed \$75,000.  
10 (*Id.*) As noted above, the Court does not find that an estimate of future attorney fees can be used  
11 to satisfy the amount in controversy requirement. Therefore, JBS has failed to prove by a  
12 preponderance of the evidence that at the time of removal the amount in controversy was greater  
13 than \$75,000. For that reason, Skau's motion to remand is GRANTED.

14 Skau additionally asks the Court to award him attorney fees and costs because "JBS  
15 lacked an objectively reasonable basis for removing this case to federal court." (Dkt. No. 13 at  
16 12.) Because courts throughout our Circuit have resolved this issue differently, the Court  
17 concludes that JBS had an objectively reasonable basis to remove the case. Skau's motion for  
18 attorney fees and costs is DENIED.

19 **III. CONCLUSION**

20 For those reasons, Plaintiffs' motion for remand (Dkt. No. 13) is GRANTED in part and  
21 DENIED in part. The Clerk is DIRECTED to remand this case to King County Superior Court.

22 DATED this 30th day of November 2017.

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John C. Coughenour  
UNITED STATES DISTRICT JUDGE